Supreme Court, U.S.
FILED
FEB 8 - 2005
OFFICE OF THE CLERK

(5)

No. 04-712

IN THE
Supreme Court of the United States

LINCOLN PROPERTY COMPANY AND
STATE OF WISCONSIN INVESTMENT BOARD,
Petitioners,

v.

CHRISTOPHE ROCHE AND JUANITA ROCHE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONERS

RICHARD A. DEAN
TUCKER, ELLIS & WEST LLP
1150 Huntington Bldg.
925 Euclid Avenue
Cleveland, Ohio 44115
(216) 592-5000

MICHAEL E. REHEUSER
JORDAN COYNE & SAVITS LLP
10509 Judicial Drive, Suite 200
Fairfax, Virginia 22030
(703) 246-0900
Counsel for State of Wisconsin Investment Board

DAVID C. FREDERICK
Counsel of Record
EUGENE M. PAIGE
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
Counsel for Lincoln Property Company and State of Wisconsin Investment Board

CONNIE N. BERTRAM
VENABLE LLP
575 7th Street, N.W.
Washington, D.C. 20004
(202) 344-4000
Counsel for Lincoln Property Company

February 8, 2005

CORPORATE DISCLOSURE STATEMENTS

Petitioners' Statements pursuant to Rule 29.6 were set forth at page ii of the petition for a writ of certiorari, and there are no amendments to those Statements.

TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENTS i

TABLE OF AUTHORITIES iii

ARGUMENT:

I. RESPONDENTS DO NOT CONTEST THAT A CONFLICT EXISTS ON WHETHER THE CITIZENSHIP OF NON-PARTIES IS RELEVANT IN DETERMINING DIVERSITY 2

A. The Fourth Circuit Rule Unquestionably Looks Outside The Complaint 2

B. This Court's Cases Do Not Support Respondents' Assertion That The Citizenship Of Non-Parties Is Relevant 3

C. The Fourth Circuit's Rule Concededly Conflicts With The Majority Rule And Is A Question Of Surpassing Importance 7

II. THE FOURTH CIRCUIT'S "VERY CLOSE NEXUS" HOLDING IS A NEW RULE THAT CONFLICTS WITH THREE OTHER CIRCUITS 8

A. The "Nexus" Language Is Necessary To The Court's Erroneous Holding 8

B. The Fourth Circuit's Rule Creates A Circuit Conflict 9

C. The Importance Of The Question For The Real Estate Industry Is Undeniable 10

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Burden v. General Dynamics Corp., 60 F.3d 213 (5th Cir. 1995) 5, 6

Chapman v. Barney, 129 U.S. 677 (1889) 4

Corfield v. Dallas Glen Hills LP, 355 F.3d 853 (5th Cir. 2003), *cert. denied*, 124 S. Ct. 2421 (2004) 7

Great Southern Fire Proof Hotel Co. v. Jones, 177 U.S. 449 (1900) 4

Grupo Dataflux v. Atlas Global Group, L.P., 124 S. Ct. 1920 (2004) 10

Indiana Gas Co. v. Home Ins. Co., 141 F.3d 314 (7th Cir. 1998) 7

Lumbermen's Mut. Cas. Co. v. Elbert, 348 U.S. 48 (1954) 4, 5

Marshall v. Baltimore & O.R.R., 57 U.S. (16 How.) 314 (1854) 5

Plains Growers, Inc. v. Ickes-Braun Glasshouses, Inc., 474 F.2d 250 (5th Cir. 1973) 7

St. Louis & S.F. Ry. v. James, 161 U.S. 545 (1896) 6

Simpson v. Providence Washington Ins. Group, 608 F.2d 1171 (9th Cir. 1979) 7, 8

Taber Partners, I v. Merit Builders, Inc., 987 F.2d 57 (1st Cir. 1993) 9, 10

United Steelworkers v. R.H. Bouligny, Inc., 382 U.S. 145 (1945) 4

Wood v. Davis, 59 U.S. (18 How.) 467 (1856) 6

STATUTES AND RULES

28 U.S.C. § 1332(c) 4

Fed. R. Civ. P. 17(a) 7

REPLY BRIEF FOR PETITIONERS

The Fourth Circuit's rules for determining diversity jurisdiction create massive uncertainty for businesses, such as those like Lincoln in the real estate industry. By looking beyond Lincoln, a named defendant, to other entities that the court speculated had an interest in the litigation, the Fourth Circuit deepened a circuit conflict that now includes virtually every circuit in the federal system. Only this Court's guidance can clarify whether (1) it is proper for a court to determine diversity based on putative defendants not named in the complaint; and (2) it is appropriate to gauge the citizenship of a limited partnership by the "very close nexus" (Pet. App. 16a) of its activities with a state, rather than just the citizenship of its individual partners. Both questions warrant this Court's review, and respondents nowhere deny that this case presents an ideal vehicle for addressing them.

Respondents do not contest that diversity of citizenship rules are particularly important to the federal system because of the sheer numbers of filings and that the indeterminant "nexus" inquiry and look-outside-the-complaint approach of the Fourth Circuit are the antithesis of bright-line rules. Nor do they address the court of appeals' cases that conflict with the decision below.

Instead, respondents mischaracterize the Fourth Circuit as holding that Lincoln was a "limited partnership" or an unincorporated business association whose individual members consist of at least one Virginian. The court did no such thing; rather, it did not question that Lincoln Property Company is a corporation and, in fact, is "a Texas citizen." Pet. App. 16a. Moreover, respondents' opposition eschews *any* discussion of the numerous cases that conflict with the Fourth Circuit's rule. Respondents seek to avoid the deep circuit conflict by citing decisions of this Court that supposedly "answer" the question. But those cases are either irrelevant or, when properly understood, contrary to respondents' position. Finally, respondents' opposition obfuscates the second issue by character-

izing the Fourth Circuit's "very close nexus" holding as "mere dicta." Opp. 6. Had the court below stopped when it concluded that Lincoln is "a Texas citizen," it never would have looked at the factual connections between EQR and Virginia. The court's "very close nexus" rule is therefore central to its erroneous holding, and that rule conflicts with the holdings of three other circuits.

I. RESPONDENTS DO NOT CONTEST THAT A CONFLICT EXISTS ON WHETHER THE CITIZENSHIP OF NON-PARTIES IS RELEVANT IN DETERMINING DIVERSITY

A. The Fourth Circuit Rule Unquestionably Looks Outside The Complaint

Central to the Fourth Circuit's erroneous holding was its conclusion that "[d]iversity of citizenship . . . is determined not by reference to the formal or nominal parties but, rather, there must be complete diversity between the real and substantial parties in interest." Pet. App. 6a. Thus, in the Fourth Circuit's view, a court *is required to* look outside the complaint to ascertain whether any non-party putative defendants are the "real and substantial parties in interest." *Id.* Indeed, the court below took the district court to task for failing to venture beyond the named parties: "The court did not determine the citizenship of the real parties in interest." *Id.* at 10a. The Fourth Circuit then *sua sponte* purported to conduct that very analysis, by looking beyond Lincoln Property Company – what it characterized as a "formal" named party – and examining evidence concerning EQR/Lincoln Limited Partnership and Jeff Franzen, one of Lincoln's executives who resides in Virginia and who was allegedly described as a "partner" in a deposition. The court then concluded, "the citizenship of the real parties in interest escapes us because of the confusing structure of the Lincoln group of enterprises." *Id.* at 14a. Yet none of the members of this "group of enterprises" other than Lincoln itself was named as a defendant in this case.

Curiously, respondents seek to confuse the issue by mischaracterizing the court's holding. Throughout their opposition (without citation to the court's opinion), respondents repeatedly argue that the Fourth Circuit found that Lincoln "was some type of unincorporated business entity" (Opp. 1), but that was not what the court concluded. Rather, the court agreed that "Lincoln Property Company, is a Texas citizen." Pet. App. 16a. The court then erroneously concluded that "the real and substantial party in interest is the *Virginia subsidiary*, be it a partnership, corporation or otherwise, rather than the Texas parent." *Id.* (emphasis added). Notably, respondents acknowledge by omission that there *is* no such "Virginia subsidiary" of Lincoln. And they do *not* defend the court of appeals' rationale – that it was empowered to look beyond the four corners of the complaint in a free-wheeling search for possible interested defendants. Rather, they seek to defend the judgment below on a ground explicitly *rejected* by the Fourth Circuit – that Lincoln, the parent company, was a partnership instead of a corporation.[1]

B. This Court's Cases Do Not Support Respondents' Assertion That The Citizenship Of Non-Parties Is Relevant

Respondents misrepresent various cases as ostensible authority that this Court has sanctioned courts looking outside the complaint to ascertain putative non-named defendants who would destroy complete diversity.[2] They

---

[1] *See* Opp. 4 ("These facts show that the named and served defendant, Lincoln Property Company, was a partnership with a Virginia partner."); *id.* at 5 ("the record demonstrated that the named/served Lincoln party was a limited partnership"); *id.* at 7 (Fourth Circuit "held that Lincoln Property Company was a named and served party which was in a partnership with the other general or limited partners whose citizenship was never proven."); *id.* at 9 ("[T]he court treated Petitioner as an unincorporated association."). Respondents, therefore, have no credibility denying what the Fourth Circuit so evidently did: "the court did not need to examine a 'not named' defendant." *Id.*

[2] Respondents cite (Opp. 9) three cases from this Court which hold that the citizenship of unincorporated associations is treated, for diver-

cite (Opp. 3) *Lumbermen's Mutual Casualty Co. v. Elbert*, 348 U.S. 48 (1954), for example, and then contend that "the Court found that the insurer was not a formal party, but had a substantial legal interest in the action." Opp. 11. That mischaracterization is difficult to understand, because the insurer *was* a named party. Indeed it was the party who brought the case to this Court, which addressed a situation analogous in relevant respects to the one here. An in-state tort victim had two causes of action under state law, one against the tortfeasor, who happened to be non-diverse; and another against an out-of-state insurance company under a state statutory provision. Instead of suing the in-state tortfeasor, the plaintiff sued the insurer in federal court under diversity jurisdiction. *See* 348 U.S. at 49-50. The insurer, which had certain procedural rights under state law that it wanted to invoke, sought to have the case dismissed for lack of subject-matter jurisdiction on the ground that the tortfeasor was non-diverse from the plaintiff and should be considered. *See id.* at 50.

As the Court framed the issue, "the sole question to be decided is whether the United States District Court in Louisiana has jurisdiction over this suit for damages brought under the direct action statute against the wrongdoer's insurer alone, where diversity of citizenship exists between the complainant and the defendant insurer but not between the complainant and the wrongdoer." *Id.* The Court held that, because the plaintiff did not name the non-diverse tortfeasor as a defendant in the lawsuit,

---

sity purposes, as the place where each of its members is a citizen. *See Chapman v. Barney*, 129 U.S. 677 (1889) (joint stock company); *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. 449 (1900) (limited partnership association); *United Steelworkers v. R.H. Bouligny, Inc.*, 382 U.S. 145 (1945) (labor union). Those cases recognize that a corporation – such as Lincoln – is a citizen of its state of incorporation and of the state of its principal place of business. Indeed, *Steelworkers* explained that Congress has now codified that rule in 28 U.S.C. § 1332(c). *See* 382 U.S. at 148 n.4. Thus, respondents have no basis for invoking those cases to defend what the Fourth Circuit did below.

there was no reason to take into account that non-party's citizenship in determining whether diversity was present. *Id.* at 51. As the master of his complaint, the plaintiff was not obliged to sue a non-diverse party, and that non-party's citizenship was irrelevant in determining the diversity of the parties before the court. "Thus a complete disposition of the entire claim may be made in this one action, without injustice to any of the participants." *Id.* at 52. *Lumbermen's Mutual* therefore supports *petitioners'* contention that it was completely improper for the Fourth Circuit to look beyond the complaint to take into account the citizenship of any non-named putative defendants.[3]

Nor do any of the other cases of this Court cited by respondents support the proposition that a court may consider non-parties to destroy diversity. In *Marshall v. Baltimore & Ohio Railroad*, 57 U.S. (16 How.) 314 (1854), this Court rejected the notion that the citizenship of a corporation was to be assessed by "the persons who act as the representatives, curators, or trustees, . . . and in such capacity are the real parties to the controversy." *Id.* at 328-29. Rather, the Court confirmed the general rule that a corporation is deemed to be a citizen of the state of its incorporation (*id.* at 329), a rule that is applicable here to support the Fourth Circuit's recognition that *Lincoln* is a citizen of Texas, where it is incorporated.

---

[3] Respondents confuse a point not relevant here. As the Texas Law Review note (and *Lumbermen's Mutual*) make clear, a court will scrutinize whether all *named* defendants are actually interested in the lawsuit. That is for the purpose of precluding plaintiffs from suing *non-diverse defendants* for the sole purpose of destroying complete diversity. But respondents here did not sue any nominal defendants. The defendants they actually sued are both diverse and substantially interested in the outcome. Thus, this case simply does not present the situation implicated when a nominal defendant is named that would destroy complete diversity. In that situation, it is well settled that a court can *ignore* or *dismiss* the nominal named defendants and jurisdiction can be maintained in federal court. *See, e.g., Burden v. General Dynamics Corp.*, 60 F.3d 213, 217-18 (5th Cir. 1995).

In *St. Louis & S.F. Railway v. James*, 161 U.S. 545 (1896), this Court considered a suit brought by a Missouri citizen against a Missouri railroad corporation that was also "authorized by the law of another state to do business therein" by virtue of its purchase of a railroad and facilities in Arkansas. *Id.* at 563. Confronted with the question whether this Arkansas deal created complete diversity (because the railroad could be deemed a citizen of Arkansas), the Court held "no," because no congressional statute authorized such dual state incorporations and the Court was "unwilling to sanction such an extension." *Id.* That holding has no relevance here.

Finally, in *Wood v. Davis*, 59 U.S. (18 How.) 467 (1856), the Court addressed what has become recognized as the rule that a plaintiff may not join a non-diverse defendant to the lawsuit solely for the purpose of destroying diversity where that "defendant" had no "interest of their own in the subject in controversy." *Id.* at 470. *E.g.*, *Burden*, 60 F.3d at 217-18. Respondents misleadingly say that in this case "*defendants* were tested as to whether or not they were parties in interest in deciding diversity jurisdiction." Opp. 12. But the Court in *Wood* did not sanction a court looking *outside* the complaint to ascertain whether non-named putative defendants might exist that would destroy diversity. Rather, it looked only at the defendants named in the complaint and limited the plaintiff's right to name nominal parties who had no real interest in the outcome of the suit for the apparent purpose of destroying diversity. That concern is not present here, because both Lincoln and SWIB – the only defendants actually named in the complaint – have a substantial interest in the outcome.[4] Neither respondents nor the court below has ever

[4] EQR does have an interest in this lawsuit, but it is in fact diverse, as the district court concluded. Pet. App. 88a. As *amici* Real Estate Roundtable *et al.* note (Br. 7), real estate companies routinely organize themselves so that their business association structures are limited solely to specified functions or the assets of a particular property. Thus, other businesses affiliated with Lincoln do own or manage properties in Virginia that have nothing to do with the apartment complex

identified any Lincoln entity that both has a substantial interest in the outcome of the suit and is a citizen of Virginia – and there is none.

C. The Fourth Circuit's Rule Concededly Conflicts With The Majority Rule And Is A Question Of Surpassing Importance

A substantial and deep conflict now exists between the Fourth and Seventh Circuits, on the one hand, and the Second, Third, Fifth, Sixth, Eighth, and Tenth Circuits, on the other. *See* Pet. 15-19. The Ninth Circuit has issued rulings going in both directions. *See id.* at 19-21. Respondents have no answer to this conflict. Indeed, they neither cite nor discuss those cases, relying instead on their misreading of this Court's precedents for the ostensible proposition that "[t]he jurisdictional 'real party in interest' rule is applicable to both plaintiffs and defendants." Opp. 2. No decision of this Court cited by respondents stands for that proposition, and the courts of appeals are in open conflict on that question. *See* Pet. App. 7a (acknowledging with "*But cf.*" cite the conflict with *Plains Growers, Inc. v. Ickes-Braun Glasshouses, Inc.*, 474 F.2d 250, 252 (5th Cir. 1973)[5]); Pet. 16 & n.9 (Seventh Circuit in *Indiana Gas* explicitly recognizes the conflict).[6]

that is the subject of respondents' lawsuit. For purposes of ascertaining diversity of citizenship for Lincoln in *this* suit, those entities are entirely irrelevant. Until the Fourth Circuit's decision below, citizenship of a defendant has never been treated like personal jurisdiction minimum contacts where a "nexus" becomes the determining element.

[5] The Fifth Circuit has long held that position, which it reiterated recently in *Corfield v. Dallas Glen Hills LP*, 355 F.3d 853, 864 (5th Cir. 2003), *cert. denied*, 124 S. Ct. 2421 (2004). *See* Pet. 16.

[6] Respondents assert that *petitioners* are "confused" about the relationship between the "real party in interest" inquiry under Federal Rule of Civil Procedure 17(a) and the "jurisdictional" rule. Opp. 10. *See also id.* at 12 (criticizing petitioners' reliance on *Simpson*). But then-Judge Kennedy's opinion explained precisely the correct jurisdictional rule to apply: "A plaintiff ordinarily is free to decide who shall be parties to his lawsuit." 608 F.2d at 1174. Just as the Ninth Circuit there refused to see the relevance of a non-diverse subsidiary – because

The issue is one of particular importance to businesses – like those in real estate – that establish separate business entities to purchase, develop, or manage properties. Because of finance, taxation, and other business considerations, such businesses routinely structure their affairs in the way that Lincoln and its affiliates have here. *See Amici* Real Estate Roundtable Br. 7. There is nothing improper about that. But a court has no basis – contrary to the Fourth and Seventh Circuits' holdings – to engage in a wide-ranging exploration into the business affairs of entities that are not named in a lawsuit in order to deny a properly named and completely diverse defendant its statutory right to remove a case to federal court.

II. THE FOURTH CIRCUIT'S "VERY CLOSE NEXUS" HOLDING IS A NEW RULE THAT CONFLICTS WITH THREE OTHER CIRCUITS

A. The "Nexus" Language Is Necessary To The Court's Erroneous Holding

Respondents contend that the "very close nexus" language is "taken entirely out of context" and "spun" by petitioners. Opp. 3. *See also id.* at 13. Respondents also suggest that the "very close nexus" test is "mere dicta." *Id.* at 6. But, without that test, there was simply no basis for the Fourth Circuit to go beyond its conclusion that Lincoln Property Company "is a Texas citizen." Pet. App. 16a. That conclusion alone should have sufficed to affirm the district court's exercise of subject-matter jurisdiction. It was only when the Fourth Circuit engaged in a fishing expedition through entities and persons affiliated with Lincoln (that are unrelated to this lawsuit) that it came to the conclusion that Lincoln had failed to carry its burden of establishing diversity. *See id.* at 15a, 18a. Thus, the "very close nexus" test was the legal rule that purported to justify the Fourth Circuit's *sua sponte* examination of

---

the plaintiff had not sued that entity – the Fourth Circuit here should not have speculated about the existence of a Lincoln "subsidiary" (that in fact does not exist) that would destroy diversity. *Simpson* is directly on point and directly in conflict with the decision below.

extraneous (and irrelevant) facts. And it was those "facts" about Lincoln's supposed "nexus" to Virginia through its imagined "Virginia subsidiary" (*id.* at 16a) that became the *sole* basis for its conclusion that Lincoln had failed to meet its burden of establishing diversity (*id.*). By holding that an inquiry into "nexus" was necessary, the Fourth Circuit created a new rule of law that is in conflict with that of three other circuits, and then applied it using facts not found in the record without affording Lincoln an opportunity for briefing, argument, or further evidentiary development. The court below's "confusion" about how Lincoln conducts its business simply reflected the court's own rush to judgment.[7]

B. The Fourth Circuit's Rule Creates A Circuit Conflict

Respondents cite *Taber Partners, I v. Merit Builders, Inc.*, 987 F.2d 57 (1st Cir. 1993), as "demonstrat[ing] the type of underlying factual basis necessary for establishing a corporate partner's principal place of business" (Opp. 14), but they misunderstand the importance of that case. The First Circuit there rejected the very nexus rule that the Fourth Circuit here applied. In *Taber Partners*, the lawsuit concerned consulting and renovation contracts for a hotel in Puerto Rico owned and operated by the defendant general partnership whose partners were corporations. *Id.* at 58. The First Circuit *reversed* a judgment that had placed "greater significance" for determining the citizenship of the partnership on "the location of the corporations' primary activity" – Puerto Rico. *Id.* at 60 ("We do not concur in the district court's analysis."). Instead,

---

[7] To the extent that respondents offer any response, it is off-point. Respondents assert that Lincoln "made conclusory statements" and otherwise failed to present the requisite facts. Opp. 14. But the district court had no trouble discerning the controlling facts on the basis of the proper legal standards: to look only at the defendants actually named in the complaint and, upon indulging respondents' contentions about EQR, to examine the *citizenship* of EQR's (wholly diverse) partners and not the "nexus" of that entity with Virginia.

the First Circuit rested on the traditional factors for determining citizenship that the court below disregarded. *Id.* at 61 ("[T]he separate corporate identities of a parent and subsidiary should be honored when determining either one's principal place of business."). Notably, respondents ignore that the decision below directly conflicts with the Second and D.C. Circuits. *See* Pet. 23-24 & n.12.

C. The Importance Of The Question For The Real Estate Industry Is Undeniable

As the *amici* Real Estate Roundtable *et al.* make clear, the Fourth Circuit has deepened circuit conflicts on issues that affect the daily operations of entities throughout the real estate industry. Respondents seek to defend the judgment below on the ground that forcing petitioners to defend their suit in state court is not unfair, in light of Lincoln's supposed property ownership and other business interests in the state. Opp. 6. But that is precisely the kind of indeterminate balancing test that leads to confusion and inconsistency in application. This Court has long favored bright-line rules in determining jurisdiction, and this supposed "fairness"-based "nexus" inquiry is the antithesis of a bright line, which is vital to serving the goal of "minimizing litigation over jurisdiction." *Grupo Dataflux v. Atlas Global Group, L.P.*, 124 S. Ct. 1920, 1929-30 (2004). Associations representing every facet of the real estate business have explained how the Fourth Circuit's judgment sows massive and unnecessary confusion. This Court's plenary review is clearly warranted to clarify these bedrock jurisdictional principles.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

BEST AVAILABLE COPY

Respectfully submitted,

RICHARD A. DEAN
TUCKER, ELLIS & WEST LLP
1150 Huntington Bldg.
925 Euclid Avenue
Cleveland, Ohio 44115
(216) 592-5000

MICHAEL E. REHEUSER
JORDAN COYNE & SAVITS LLP
10509 Judicial Drive, Suite 200
Fairfax, Virginia 22030
(703) 246-0900
Counsel for State of Wisconsin Investment Board

DAVID C. FREDERICK
Counsel of Record
EUGENE M. PAIGE
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
Counsel for Lincoln Property Company and State of Wisconsin Investment Board

CONNIE N. BERTRAM
VENABLE LLP
575 7th Street, N.W.
Washington, D.C. 20004
(202) 344-4000
Counsel for Lincoln Property Company

February 8, 2005